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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 949

JEWELL GABBARD LITTERAL AND LOUIS DYSON,
Petitioners,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE SEVENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the Seventh Circuit, reported in 300 F. 2d 340. References to (App.) are to the Appendix bound with our Court of Appeals brief of which ten copies have been filed in this Court.

BASIS OF JURISDICTION.

The judgment of the Court of Appeals was entered February 28, 1962. A petition for rehearing was filed but denied on March 30, 1962. Stay of mandate was entered April 4, 1962. The opinion of the Court of Appeals appears in the Appendix to this petition.

Jurisdiction is invoked under Title 28, United States Code, § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. When the law of Illinois makes it clear that a broad construction is to be given to the nature of the use insured, and to fleet coverages in general, is not such binding upon the Federal courts?

2. When the purposes for which the aircraft policy was issued are broadly defined, as to Coverage D, including the "transportation of executives, employees, guests and customers" and including "instruction and rental to others", and "use for personal, pleasure, family and other business purposes", can the insurer by using a restrictive definition of Coverage E (under which recovery is not sought) nullify the protections promised under the preceding insuring agreement?

3. Can the insurer rely upon a defense of nonpayment of premiums when (a) the coverage is a fleet policy, upon a reporting form, with premiums to be determined upon audit; (b) the insurer admitted (App. 6) that the policy of insurance was "in full force and effect"; and (c) the insurer did not plead or prove any defense of nonpayment of premiums?

4. When both the insured, Dyson, and insurance company reported to the State of Illinois that coverage existed upon this aircraft and covered the injuries to the injured

plaintiff, does not such constitute a construction by the parties which is conclusive upon the coverage issue?

5. When active negligence of the airport operator and of his employees was covered by the airport policy, and such negligence would have caused the accident to occur irrespective of who owned the aircraft, does not such coverage remain in effect even though the policy purports to exclude injuries arising from use of aircraft owned by the insured?

STATEMENT OF THE CASE

Upon November 9, 1959, Jean Gabbard Litteral recovered a judgment in the amount of $25,000 against Louis Dyson, doing business as Illini Airport. The findings of facts in that suit, as to which there is no quarrel, showed that upon September 5, 1955, Louis Dyson was doing business as Illini Airport and owned a Globe Swift Model GC-1B airplane, which he was attempting to sell to Robert Schindler (App. 2). Dyson's employees directed Schindler to take off, Mrs. Litteral being a guest occupant of the plane, and a crash occurred. The findings of fact further disclosed (App. 3, 4):

> "that said defendant (Dyson), either by himself or by his agents and servants negligently and carelessly did one or more of the following acts or omitted to do said acts, namely:
>
> "a. Negligently and carelessly directed the pilot of said airplane to take said airplane off the ground and into the air when a cross wind was blowing along the flight strip.
>
> "b. Negligently and carelessly directed the pilot of said airplane to pilot said airplane into the air when it was too close to the outside edge of the flight strip, and so as to create a hazard.
>
> "c. Negligently and carelessly furnished an airplane with a defective propeller or a propeller which

was of a design not suited or proper for installation in said airplane.

"d. Negligently and carelessly operated said airport and operated said airport in violation of the provisions of the Statutes of Illinois and the Civil Aeronautics Regulations, and failed to make an inspection of said airplane as required, and did negligently and carelessly operate said airport with a hazard as is alleged herein, located thereby."

At that time, Dyson had all of his liability insurance with the defendant, Indemnity Insurance Company of North America. One of these policies was an aircraft liability policy AVL 38622, the other policy was an airport liability policy, APL 9941 (App. 9).

Under the aircraft liability policy, the general liability provision, coverage D agreed (App. 23):

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish, including death at any time resulting therefrom, sustained by any person or persons other than passengers as defined herein; *arising out of the ownership, maintenance or use of the aircraft as described in this policy.*" (Italics supplied.)

The "ownership, maintenance or use" of the aircraft is set forth in Item 6 of the declarations (App. 21) and was defined as "commercial"—the broadest category which included the lesser categories and embraced "personal, pleasure, family and other business uses", "instruction and rental to others", "transportation of executives, employees, guests and customers" (App. 21).

Coverage E of that policy dealt with injuries to passengers. Certain aircraft were added by endorsement from time to time to the policy for the specific transportation of passengers, and special premiums were paid for that coverage (App. 12).

The aircraft liability policy, in its basic form (coverage D) was in the amount of $15,000 for injury to each person and covered "all NC licensed aircraft owned, operated, leased or borrowed by the named insured" and expressly provided as follows (App. 24):

"AIRCRAFT LIABILITY REPORTING FORM ENDORSEMENT.

"It is hereby understood and agreed that:

"1. Automatic Attachment and Termination of Coverage:

"The coverages as indicated in the schedule of Coverages of this policy shall apply to all aircraft having an 'NC' certificate issued by the United States Civil Aeronautics Administration owned by the insured at the inception date of this policy and shall automatically apply to any similarly certificated aircraft acquired by the insured as owner during the policy period. This insurance shall terminate with respect to any aircraft disposed of on the date of sale of such aircraft or the surrender of the legal possession thereof by the insured or upon expiration of this policy, whichever may first occur.

"3. Deposit Premium and Rates:

"The deposit premium payable upon inception of this policy is $100.00.

"The rates for this policy are:

Coverages	Rates
D & F	$.14 per day, each aircraft owned or operated.

The airport policy was in the amount of $50,000 for each person and covered (App. 13):

"* * * all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish including death at

any time resulting therefrom, sustained by any person or persons and arising out of the ownership, maintenance or use of the airport premises described in the declarations and all operations which are necessary or incidental to the ownership, maintenance or use of said premises as an airport."

That policy had an exclusion (f) as follows (Abst. 28):

"to bodily injury or death or injury to or destruction of property caused by or arising out of (1) the existence, maintenance or use of any aircraft owned by, hired by or for, or loaned to the insured or any aircraft in flight by or for the account of the insured."

Under the law of Illinois, a report is required to be filed. Under *Illinois Revised Statutes*, Ch. 15½, § 22.42(a, b), a report is required of any accident involving aircraft in this State with a disclosure as to insurance; and if no insurance is in force, the posting of security is required (Appendix to this Petition, p. 35). Pursuant to this statute, a report was filed by the defendant insurance company (Abst. 29) as follows:

INSURANCE COMPANY: Kindly complete this form and return same to
STATE OF ILLINOIS, DEPARTMENT OF AERONAUTICS

CAPITAL AIRPORT
Springfield, Illinois

ACCIDENT NO. #528

With regard to the aircraft liability insurance policy for the policy holder named on the reverse side hereof, the undersigned insurance company advises you in accordance with the items checked below:

☐ 1. No policy was in effect on the date of the accident

☑ 2. Our policy affords bodily injury coverage of not less than $5,000 for 1 person $10,000 for 2 or more ( ) includes passenger liability ☑ ( ) excludes passenger liability ☐

☑ 3. Our policy affords property damage coverage of not less than $5000

Remarks

by Indemnity Insurance Co. of N. A.
Name of Insurance Company

Donald J. Bain
Authorized Representative

Form A 8

A garnishment action was filed by the injured plaintiff and the insured against the insurance company under the two policies previously described. The facts were stipulated and appear in the Appendix filed in the Court of Appeals. The trial court found that the airport policy did not cover, on the basis that the accident arose out of the use of aircraft owned by the insured; and held that the aircraft policy did not cover on the basis that the injury was to a person whose injury arose under coverage E, and that this particular aircraft was not covered under coverage E. The trial court was affirmed upon appeal, its opinion largely being adopted by the reviewing court.

The controversy involved a diversity of citizenship and an amount in controversy in excess of $10,000, thereby presenting a federal question.

SUMMARY OF ARGUMENT.

Where an airport operator purchases two policies from a single insurer—one covering negligence in airport operations, and the other a fleet policy upon all aircraft, he is protected by one or both policies when an injury is received by the guest of a renter or prospective purchaser caused by the negligence of airport employees.

A policy which provides for automatic coverage of all aircraft owned or later acquired by the insured is a fleet policy. Under both general law and Illinois law, it is not necessary that the premium be paid in advance where a deposit has been made and the policy by its terms provides for premium payment subsequent to "audit" at prescribed intervals. In such event, where a broad definition of risks insured is given by the face of the policy, including "guests", "renters", etc., such coverage is conferred by Coverage D. Since recovery is not sought under Coverage E, such proviso cannot be used to limit the liability conferred by Coverage D, by employing a stringent definition of "passenger" applicable to Coverage E. The insurer, by so using a broad definition of the word "passenger" cannot destroy the protection conferred by Coverage D, as defined by the face of the policy—the plaintiff not being a passenger for hire but only a guest occupant of the plane. This is especially true where the parties have demonstrated their practical construction of the contract by certifying to the State of Illinois that coverage was available upon this particular craft and that it extended to this injury.

Likewise, where negligent acts of the insured's employees caused the crash to occur, an exclusion applicable under

the airport policy as to aircraft owned by the insured did not destroy protection against the consequences of such negligent acts under the general liability provisions. This is true since such negligence would have caused the crash to occur irrespective of the condition of the aircraft or of its ownership.

ARGUMENT.

When an airport operator purchases from a single company two policies—one intended to cover liability arising from all airport operations other than caused by aircraft, and the other designed to cover liability resulting from the use of aircraft, he has a right to expect protection under one or the other. It is our conviction that the policy contracts are ambiguous and deceptive; that the insurance company did not even conceive of its policy defense except at a later date; and that the opinion of the Court of Appeals fails to give cognizance to the law of Illinois controlling in this situation.

Under Illinois law, it has repeatedly been stated that in ascertaining the meaning of contractual terms, the courts will look to the interpretation which the parties themselves have placed upon it by their acts, conduct, or statements. *City of Chicago* v. *Chicago City Railway Company*, 245 Ill. App. 473 at 478; *Stetson* v. *Chicago, Aurora & Elgin Railway Company*, 2 Ill. App. 2d 274 at 279, 280, 119 N. E. 2d 395 at 398; *Walters* v. *Walters*, 409 Ill. 298 at 304, 99 N. E. 2d 342. Thus, as stated in *Wager* v. *Robinson Nash Motor Company*, 340 Ill. 81 at 91, 172 N. E. 7 at 11:

> "In the construction of contracts for the purpose of ascertaining the intention of the parties the court will endeavor, by extrinsic evidence of such facts as the parties had in view, to place itself as nearly as possible in their position, so that it may understand the language used in the sense intended by them. (Citations.) In seeking to ascertain the intention, regard will also be had to the practical construction, if any, which the parties by their acts have given the con-

tract. (*Whalen* v. *Stephens*, 193 Ill. 121.) So, also, the acts of the parties themselves indicative of their construction placed upon it may be resorted to for the purpose of determining the true meaning of the written agreement, and in this regard it makes no difference whether such acts are contemporaneous or subsequent."

In fact, it was pointed out in *Colling & Ewing Company* v. *Silver*, 150 Ill. App. 430 at 433, 434:

"There is, however, another well known rule of construction applied to written instruments, viz: that in construing a written contract the court will endeavor to place itself in the position of the contracting parties, and read the instrument in the light of the circumstances surrounding them at the time it was made and of the object which they then evidently had in view, so that the court may understand the language used in the sense intended by the parties using it. (Citations.) *If the intention of the parties to a written contract is sufficiently apparent, effect must be given to it in that sense, though violence be done thereby to its words, for greater regard is to be had to the clear intent of the parties than to any particular words which may have been used in the expression of the intent.* (Citations.)

"'In seeking to ascertain the intention of the parties to a written contract regard will be had to a practical construction if any which the parties by their actions have given to the contract.'" (Italics supplied.)

Louis Dyson filed his report (Plaintiff's Exhibit 8A) describing the accident and showing that such coverage was carried with the Indemnity Insurance Company of

North America. The insurer completed and returned the form to the State of Illinois as follows (App. 29):

INSURANCE COMPANY: Kindly complete this form and return same to
STATE OF ILLINOIS: DEPARTMENT OF AERONAUTICS

CAPITAL AIRPORT
Springfield, Illinois

ACCIDENT NO 7-528

With regard to the aircraft liability insurance policy for the policy holder named on the reverse side hereof, the undersigned insurance company advises you in accordance with the items checked below:

☐ 1. No policy was in effect on the date of the accident.

☑ 2. Our policy affords bodily injury coverage of not less than $5,000 for 1 person $10,000 for 2 or more ☑ includes passenger liability ☐ excludes passenger liability

☑ 3. Our policy affords property damage coverage of not less than $5,000

Remarks

by Indemnity Insurance Co of N. A.
Name of Insurance Company

Donald J. Bain
Authorized Representative

Form A-1

The lower courts became confused and referred to this as creating a contract by operation of the doctrines of "waiver" or "estoppel". Those doctrines are not required here. The furnishing of this report constitutes a practical construction by the parties that coverage was then in force, and effect as to this particular occurrence. The furnishing of these reports has an important public purpose. It is to be certain that financial security exists for airport operators. Had it been certified that there was no insurance protection here, the State would have required it to be furnished for the indemnification of other persons subsequently injured. (See Appendix to this Petition, p. 35.) Indeed there may have been past accidents for which the company certified the existence of insurance so as to preclude past State investigation of the coverage issue. When a report is required by law, and a statement is furnished by an authorized representative of an insurance company and such statement is never withdrawn or modified, and it is relied upon by the public and govern-

mental authorities—then we say such insurer would be estopped thereafter to say that such statement is untrue.

And Illinois has held this to be the proper rule. Lawyers constantly assert that the law tends to become more and more liberal. Yet Illinois has already adhered to such a ruling for almost a century.

In *Alexander v. Barrett*, 46 Ill. 226, a suit was brought to recover damages for the breach of an oral contract to deliver a certain number of barrels of tar, the number being disputed. The court declared, at page 229:

> "He (plaintiff) has proved that, although he understood the contract in a sense much more favorable to himself, the defendants insisted on such a contract as he has alleged, and although it is not a case of estoppel *in pais*, as suggested by counsel, it is one where justice requires the statements of the defendants to be received as satisfactory proof * * *. The defendants cannot complain if they are assessed on a basis furnished by themselves."

A few years later, suit was brought to compel the lessor of certain business premises to maintain them in operation and to reimburse the lessee for his expenses for such repairs. The court, in *Schmohl v. Fiddick*, 34 Ill. App. 190 at 198, stated:

> "So in cases where a party himself places a construction upon a contract and agrees to execute the contract according to such construction, and thereby induces its execution, he will be estopped from afterward repudiating such construction and insisting upon one more favorable to himself. (Citations.)
>
> "When a contract is in any respect doubtful or peculiar, and the parties by their declarations or acts have placed a reasonable construction upon it, such construction will be adopted by the courts, in case of litigation upon it."

A like result followed in *People* v. *Adams*, 65 Ill. App. 283 at 287; and the rules thus early established have become an integral part of Illinois law. We believe that law was binding upon the Court of Appeals and that it had no right to disregard such rules, under *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Now, going to the insurance policies directly, the aircraft policy was a fleet or blanket coverage under which all units owned or acquired by the insured automatically were covered for bodily injury liability. As shown in this particular situation, an advance premium was paid and a certain charge made per day for the protection, the further amounts due being determined by subsequent audit; and it has expressly been admitted here that both policies were in full force and effect (App. 6).

The place where both the District Court and the Court of Appeals became confused was in failing to distinguish between Coverage D and Coverage E. We are not claiming under Coverage E. That is the coverage, however poorly defined, which was set up to take care of the "carrier" situations. Every small airport keeps a couple of planes for carrier use—in this particular instance such being also for ambulance purposes, as shown by the face of the policy which insured not only Dyson but "E. H. Renner Funeral Home, Inc." But the injured plaintiff was not a passenger for hire of the airport, does not claim as such, and is not required to come under the protection of Coverage E.

Coverage D applies to all bodily injuries except the "passenger" situations. As set forth in the policy it covers all personal injuries "sustained by any person or persons other than passengers as defined herein, arising out of the ownership, maintenance or use of the aircraft as described in this policy". The face of the policy defines

the nature of the uses which includes the transportation of executives, employees, guests, customers, instruction, rental, personal, pleasure, family, and business uses (App. 21). Item 6 of the face of the policy makes a specific distinction between those uses and "passenger carrying for which a charge is made" (App. 21):

The defendant insurance company now attempts to contend that no coverage is given under Coverage D wherever any person is injured "while in or boarding the aircraft for the purpose of riding or flying therein, or while alighting from the aircraft after a ride, flight or attempted flight therein". If this is true, then may we ask what protection was given by Coverage D? Here is an aircraft operator, who owns a number of aircraft. A few planes are kept for carrier or ambulance purposes. The rest are used to teach students how to fly, for rental to those already possessing licenses, or for flights by the operator or his employees in connection with the ordinary airport business. For example, an airport employee flies one of the planes into a craft owned by another, or in landing crashes into a barn injuring a student in the plane. A student soloing crashes by reason of defective landing gear. A week-end pilot goes into a stall because of a propeller failure and is injured. One testing a plane to purchase it crashes because of inherent failure of the craft.

Now, certainly, the insured contemplated protection in each of these instances. None of such injured persons is a "passenger" in the "passenger for hire" sense. He is a pilot, or a student, a guest, or an occupant. Is it to be said that the insured shall receive no protection for which he paid under Coverage D, because of the ambiguity of the "passenger" definition in the body of the policy?

The very attempt to contend as the defendant contends here is the thing which has brought insurance into dis-

repute. It is the Amos and Andy type of insurance where: "The big print gives it to you and the little print takes it away." Such cannot be tolerated by courts seeking to give justice to litigants. And Illinois has stated repeatedly that if an insurance policy is susceptible of more than one construction, that construction must be taken which confers protection and permits recovery, rather than one which will deny recovery. 22 *Illinois Law & Practice*, "Insurance," § 149, pp. 195-198 (Appendix to this Petition, p. 36); *Roth* v. *Kaptowsky*, 393 Ill. 484 at 491, 66 N. E. 2d 664. This law the federal courts are bound to follow, but did not do so here. While the ordinary construction of language will be given to an unambiguous contract, clearly the insurer in this situation has created an ambiguity which leaves Coverage D almost meaningless, so far as personal injuries are concerned, if its interpretation of "passenger" is accepted.

Illinois has stated in *Connett* v. *Winget*, 374 Ill. 531 at 535, 30 N. E. 2d 1:

> "The meaning of the word 'passenger' is entirely different from that of the word 'guest'."

And a student pilot has been held not a "passenger" where an aircraft policy is clearly intended to protect the insured against injuries to such persons. *Ohio Casualty Company* v. *Gantt*, 256 Ala. 262, 54 S. 2d 595 at 601.

For years, automobile insurance companies had exclusions in policies—and many still do—against coverage where the automobile is being used for livery purposes, or for the carriage of passengers for a consideration, the language varying widely over a period of years. The courts have gone to great lengths to be sure that business customers, social guests, and even persons riding upon a "share-expense" basis would not be excluded. A few of the many cases to this effect are *Standard Accident Insur-*

ance Company v. *Cloutier*, 92 N. H. 449, 32 A. 2d 684, 147 A. L. R. 626; *Pietrantonio* v. *Travelers Insurance Company*, 282 Mich. 111, 275 N. W. 786, *Beer* v. *Beer*, 134 Ohio St. 271, 16 N. E. 2d 413, 118 A. L. R. 388; *Commercial Credit Corp.* v. *Monroe*, 38 Tenn. App. 596, 277 S. W. 2d 423.

The attempt of the defendant to seek to nullify all protection promised by Coverage D, and by the face of the policy designating the nature of the risks intended to be covered thereunder, is reminiscent of the learned discussion by Lewis Carroll. As was stated in *Through the Looking Glass*:

> "'That's a great deal to make one word mean,' Alice said, in a thoughtful tone.
>
> "'When I make a word do a lot of work like that,' said Humpty-Dumpty, 'I always pay it extra.'"

And the insurer in this instance certainly should pay the word "passenger" extra, because it attempts by its use, under the construction for which it contends, completely to vitiate the insuring agreement. It collects a premium in the first instance for the protection promised to these categories of persons not falling under the "carrier" category—then it collects an additional *premium where* the legal risk is increased by the carriage of passengers for hire. What protection has it given for the basic premium, if protection is afforded to no "occupant" even though falling in a category different from a passenger transported by a carrier?

Manifestly, it is absurd to claim that every occupant of a vehicle, whether it be an airplane or an automobile, is a "passenger". That term has come to have certain legal connotations—namely, where the relationship is other than that of a guest occupant. At least, this is the law of Illinois—and, in this situation, the law of Illinois must control.

Illinois has also repeatedly stated that a broad construction must be given to protect the activities under which liability arises, where "commercial use" or a similar type of coverage is promised by the contract. *Scott* v. *Freeport Casualty Company*, 392 Ill. 332 at 345, 347, 64 N. E. 2d 542; *Wold* v. *Glens Falls Indemnity Company*, 269 Ill. App. 407 at 416. In both of those situations it was pointed out that a narrow construction would not be taken of the purpose of such insurance, but a broader construction which would afford protection to those injured through the ordinary operations of the instrumentalities insured.

When we come to the airport policy, there is more basis for the result reached by the Court of Appeals. Briefly, its reasoning is that the occurrence was one "arising out of the use of aircraft" owned by the insured, and was therefore excluded. However, it is not clear that such a result should necessarily follow.

Briefly, here is the problem. The purpose of such exclusion primarily is to prevent liability from attaching where the injury is caused from the inherent nature of the aircraft—such as a faulty propeller, a disabled engine, or something of that type. Did the injuries "arise out of" the use of the aircraft—or did they "arise out of" the use of the premises? The trial court in the original injury case found as a finding of fact, and such is not disputed here, that there was negligence in the airport operations which caused the injury to occur. Primarily, this was in directing the aircraft to take off a short runway, with a cross-wind, in a direction where high tension wires ran immediately adjacent to the airfield. The wheels snagged the wires, flipping over the plane, and causing the injury to Mrs. Litteral.

The field of insurance law does not clearly indicate that coverage is excluded in such a situation. This is compar-

able to a filling station policy covering premises and vehicles but excluding products liability. A customer orders kerosene. By mistake, a five-gallon jar of gasoline is delivered and, in the course of delivery, is dropped and explodes by reason of static electricity. Even though a products liability policy would cover the loss, and even though the products exclusion would operate once the act of negligence connected with the delivery had ceased, the insured is protected since the negligent dropping of the container was within the policy protection.

This result is sometimes reached even where there is no act of negligence then going on. For example, let us say a heating contractor installs a furnace using butane gas. The policy excludes the hazards of butane gas or liability arising by reason of defects in such appliance or products. The contractor in the course of installation leaves some of the fittings loose, so that they are in a leaky condition. Before he has completed his contract, but perhaps while he is not on the premises (in the instant case, the employee was in the actual act of directing the aircraft along the runway), butane gas escapes and explodes. Would that be covered—in view of the fact that products liability coverage or defective appliances installed by the contractor are not covered? Clearly it would be. *Boutwell v. Employers' Liability Assurance Corp.*, C. A. 5, 175 F. 2d 597 at 600, 601.

Another kindred situation arises where there is both a general liability, or "premises" policy and a vehicle policy, such as upon automobiles or, in this case, aircraft. If a portion of the liability arose out of acts covered under each of such policies, the courts seek to give protection under each policy rather than to deny it under both.

An illustration of such overlapping occurs when a truck policy covers trucking operations including "loading and

unloading", while a second insurer covers premises liability excluding, however, any occurrence arising out of the operation, maintenance, or use of vehicles. A safe is being lowered from a window preparatory to loading it into a truck when the rope breaks; coal is negligently shovelled onto the sidewalk and left in an unlighted pile or the coal chute is left open; or a delivery boy carrying a package from the delivery truck negligently runs into a pedestrian. Now while the results may vary where only one type of policy is carried—where there are both policies in force, one of them at least almost always is held to cover; frequently both are required to share the responsibility pro rata; and in other situations one is made primarily responsible and the other is made liable for any excess liability.

There are in excess of two dozen cases which lay out these rules, with the more modern authority giving a construction to the policy or policies involved so as to extend protection under the circumstances existing. See, by way of illustration, *Bituminous Casualty Corp.* v. *American Fidelity and Casualty Company*, 22 Ill. App. 2d 26, 159 N. E. 2d 7; *Coulter* v. *American Employers' Insurance Company*, 333 Ill. App. 631, 78 N. E. 2d 131; *Woodrich Construction Company* v. *Indemnity Insurance Company of North America*, 252 Minn. 86, 89 N. W. 2d 412 at 419 (holding all three companies concurrently liable); *Lumberman's Mutual Casualty Company* v. *Employers' Liability Assurance Corp.*, C. A. 1, Mass., 252 F. 2d 463 (which held only one insurer liable, although both should have been so held). And, as to acts originating upon premises, see *Moldovan* v. *United States Fidelity & Guaranty Company*, 15 Misc. 2d 85, 184 N. Y. S. 2d 201 at 204, affirmed 185 N. Y. S. 2d 735.

Reasoning from such cases, and from the general principles which apply, we think a fair question may be: "Was

the matter excluded the true cause of the injury?" We think here that it was not. The occurrence would have taken place irrespective of who owned the aircraft in question. If the injury occurred because of the active negligence of the insured's employee in directing the plane into the air, a layman purchasing such insurance would expect to be covered. And this is the test ordinarily applied by the courts in determining whether coverage should be extended or restricted.

CONCLUSION.

It is, therefore, respectfully submitted that a writ of certiorari issue to review the judgment and orders of the Court of Appeals of the Seventh Circuit, heretofore entered in this cause.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

for the Seventh Circuit.

SEPTEMBER TERM, 1961—JANUARY SESSION, 1962

No. 13510

JEWELL GABBARD LITTRALL AND LOUIS DYSON,
Plaintiff-Appellant.

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois.

February 28, 1962

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* This appeal involves a garnishment initiated by Jewell Gabbard Littrall, plaintiff-appellant,[1] who had recovered a judgment in the amount of $25,000.00, as Jewell Gabbard against Louis Dyson, doing business as Illini Airport. The defendant-appellee, Indemnity Insurance Company of North America, had in force two policies of insurance issued to Dyson, one an "Airport Liability Policy," the other an "Aircraft Liability Policy."

1 Referred to herein as garnishor.

The insurance company denied any indebtedness to Dyson, or the possession of any assets or claims due him. The District Court, after a hearing on the merits, filed a memorandum opinion containing its findings of fact and conclusions of law, and entered judgment discharging the garnishee and dismissing the garnishment proceedings. The garnishor appealed.

The findings of fact in the original action against Dyson was introduced in evidence without objection. The third paragraph of the findings of fact states:

> "that on the 5th day of September, 1955, the defendant, Louis Dyson, doing business as Illini Airport, was the owner of and possessed a certain airplane known as a Globe Swift Model C-LB Airplane, Identification Number 80621, which said plane was located at a certain airport known as Illini Airport. ..."

The additional findings of fact disclose that Louis Dyson was the owner and operator of this airport; that he entered into negotiations to sell the Globe Swift aircraft to one Robert Schindler who was assured by Dyson that the aircraft was in good mechanical condition; that there was located near the Illini Airport certain wires and hazards which Dyson knew or should have known that the aircraft with its type of propeller would have difficulty in flying over and clearing the wires; that he directed Schindler to take off, he did and a crash occurred.

The findings of fact further disclose:

> "that said defendant, [Dyson], either by himself or by his agents and servants negligently and carelessly did one or more of the following acts or omitted to do said acts, namely:
>
> "a. Negligently and carelessly directed the pilot of said airplane to take said airplane off the ground and into the air when a cross wind was blowing along the flight strip.

"b. Negligently and carelessly directed the pilot of said airplane to pilot said airplane into the air when it was too close to the outside edge of the flight strip, and so as to create a hazard.

"c. Negligently and carelessly furnished an airplane with a defective propeller or a propeller which was of a design not suited or proper for installation in said airplane.

"d. Negligently and carelessly operated said airport and operated said airport in violation of the provisions of the Statutes of Illinois and the Civil Aeronautics Regulations, and failed to make an inspection of said airport as required, and did negligently and carelessly operate said airport with a hazard as is alleged herein, located thereby."

The findings further disclose that as a proximate result of the defendant's negligent acts the airplane crashed and Mrs. Littrall who was in the plane sustained injuries.

"Item 4" of the Aircraft Liability Policy recites:

"The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto."

Under "Item 5" of the policy, the description of the aircraft is:

"All NC Licensed Aircraft Owned, Operated, Leased or Borrowed by the Named Insured."

Attached to this policy of insurance are "Endorsements" which included the following pertinent clauses:

"Endorsement #1.

"1. Automatic Attachment and Termination of Coverage: The coverages as indicated in the schedule of Coverages of this policy shall apply to all aircraft having an 'NC' certificate issued by the

United States Civil Aeronautics Administration owned by the insured at the inception date of this policy and shall automatically apply to any similarly certificated aircraft acquired by the insured as owner during the policy period. This insurance shall terminate with respect to any aircraft disposed of on the date of sale of such aircraft or the surrender of the legal possession thereof by the insured or upon expiration of this policy, whichever may first occur.

"2. . . .

"3. Deposit Premium and Rates:

. . .

The rates for this policy are:

Coverages	Rates
D & F	$.14 per day, each aircraft owned and operated

Coverage E not provided except as respects the planes described in Endorsement # 2."

"Endorsement # 2.

In consideration of premium to be determined by audit it is agreed that with respect to the following aircraft only:

1. Coverage E, Passenger Bodily Injury Liability is amended to read:

   $20,000.00 each person
   $60,000.00 each occurrence

2. The rate for the above extension shall be $.40 per day owned or operated and shall be applicable only to:

   Navion
   Piper Tri-Pacer
   Piper Tri-Pacer
   Piper PA 22

Endorsements 3, 4, 5, 6, and 7 add and delete other planes but the Globe Swift aircraft involved in the accident was not listed or mentioned on any endorsement.

Coverages D, E and F are listed under the "Insuring Agreements" in the provisions of the policy and read in part as follows:

"Coverage D—Bodily Injury Liability excluding Passengers To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish, including death at any time resulting therefrom, sustained by any person or persons other than passengers as defined herein, arising out of the ownership, maintenance or use of the aircraft as described in this policy."

"Coverage E—Passenger Bodily Injury Liability To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish, including death at any time resulting therefrom, sustained by any passenger or passengers as defined herein, arising out of the ownership, maintenance or use of the aircraft as described in this policy."

"Coverage F—Property Damage Liability" * * *

The "Airport Liability Policy" in its pertinent provisions reads:

"Insuring Agreements"

"Coverage A—Bodily Injury Liability To pay, on behalf of the insured, provided premium is charged under Coverage A in the declarations, all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish including death at any time resulting therefrom, sustained by any person or persons and arising out of the ownership, maintenance or use of the airport premises described in the declarations and all operations which are necessary or incidental to the ownership, maintenance or use of said premises as an airport."

* * *

"Exclusions."

"This policy does not apply:

* * *

"(*f*) to bodily injury or death or injury to or destruction of property caused by or arising out of (1) the existence, maintenance or use of any aircraft owned by, hired by or for, or loaned to the insured or any aircraft in flight by or for the account of the insured * * *."

The Insurer claims it is not liable to pay the judgment because the Globe Swift aircraft was not listed under Endorsement #2 of the aircraft policy and under the airport policy the Globe Swift aircraft was excluded by the exclusion clause which specifically excepted "bodily injury * * * caused by or arising out of the * * * use of any aircraft owned by * * * the insured * * *."

The purpose of construing a contract of insurance is to determine the intention of the parties. The contract of insurance must be construed as a whole. The contract consists of the policy and all endorsements attached thereto. *Morris & Co.* v. *Rhode Island Ins. Co. of Providence*, 1913, 181 Ill. App. 500.

> "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense." *Yadro* v. *United States Fidelity & Guaranty Co.*, 1955, 4 Ill. App. 2d 477, 478.

If there is an ambiguity in the contract of insurance it must be construed in favor of the Insured. *Midwest Dairy Products* v. *Ohio Ins. Co.*, 1937, 356 Ill. 389. Since the Insurer is invoking the exclusion clause the burden is upon the Insurer to show that the loss claimed is within the exclusion. *Wilson* v. *National Automobile and Cas. Ins. Co.*,

1959, 22 Ill. App. 2d 34; *Coster v. Motor Ins. Corp.*, 1961, 28 Ill. App. 2d 362.

The aircraft policy, based upon the proof, does not require the insurer to pay this judgment. The policy expressly provides: "Coverage E [which covers passenger bodily injury] not provided except as respects the planes described in Endorsement #2." Endorsement #2 does not describe the Globe Swift aircraft which was involved in the accident. This endorsement required a payment of $.40 per day for each plane so listed. Item 4 of the policy plainly stated "coverages as are indicated by specific premium charge or charges." There is no proof of payment of this charge. There is no ambiguity in the manner in which this coverage is stated. From the language of the contract the parties did not intend to provide coverage for the Globe Swift aircraft, and the Court cannot make a new contract. *Cf. Capps v. National Union Fire Ins. Co.*, 1925, 318 Ill. 350; *W. & S. Indemnity Co. v. Industrial Comm.*, 1937, 366 Ill. 240.

Garnishor contends that the aircraft policy is a fleet policy as evidenced by the clause entitled "Automatic Attachment and Termination of Coverage."

Garnishor further contends that the Globe Swift aircraft is covered by the automatic coverage clause which reads:

> "The coverages as indicated in the schedule of Coverages of this policy shall apply to all aircraft having an 'NC' certificate * * *."

The policy must be read in its entirety. *Konrad v. Hartford Accident & Indemnity Co.*, 1956, 11 Ill. App. 2d 503. The endorsements must be given effect. 22 I. L. P. § 147, p. 191. *Hoffman v. Central Surety & Ins. Corp.*, 1958, 297 Ill. App. 371. The "Coverage E", liability for passenger bodily injury, is limited in Endorsement #2 to those aircraft listed. Other coverage as provided in "D" and "F"

would be effective under the automatic coverage clause. Furthermore, Garnishor's interpretation would also increase the risk without payment of the additional premium provided, $.40 per day.

Counsel for Garnishor also contends that because "Coverage E" refers to passenger bodily injury liability, and since the Garnishor was in fact a guest in the plane she would not come within the exclusion. This argument is completely answered by the definition of passenger in the policy: "The word 'passenger' wherever used in this policy shall mean any person or persons while in * * * the aircraft for the purpose of * * * flight or attempted flight therein."

Garnishor further urges that the Insurer waived the exclusion of those planes not listed because on September 10, 1955, after the accident, the Insurer, through its authorized agent, signed an accident report and filed it with the Secretary of State pursuant to the provision of the Illinois Revised Statutes, 1959, Ch. 15½, § 22.42. In this report it was stated that Dyson had a policy covering liability insurance for the injuries sustained by the crash of the Globe Swift aircraft. The insurance policy number listed in this report was the number of the aircraft policy.

We conclude that since there was no coverage of the Globe Swift aircraft in the policy, this report to the Secretary of State in itself was insufficient to change the terms of the policy and provide additional coverage.

The next question is whether the Airport Liability Policy requires the Insurer to pay the Garnishor's judgment. Here again the policy without ambiguity specifically states:

> "This policy does not apply: * * * to bodily injury * * * caused by or arising out of * * * use of any aircraft owned by * * * the insured or any aircraft in flight by or for the account of the insured."

The Globe Swift aircraft in which the Garnishor was riding was owned by the Insured according to the findings of fact. The exclusion clause in the policy expressly excluded the injuries received by the Garnishor while riding in this aircraft.

Garnishor contends that since the accident was caused by Insured negligently directing Schindler to take off, the use of the plane was not the cause of the accident and the exclusion clause was evaded. This might be true without the words *arising out of* the use of any aircraft owned by the Insured. It must be admitted that "arising out of" is a very broad phrase. *Cf. Schmidt* v. *Utilities Ins. Co.*, 154 ALR 1088, 182 S.W. 2d 181. Although such negligence of the Insured proximately caused the crash and the injuries of the Garnishor it cannot be denied that the accident and injuries arose out of the use of the aircraft. Such construction as urged by the Garnishor is unreasonable and cannot be accepted under the wording of this policy. *Cf. Underwriters at Lloyd's of London* v. *Cordova Airlines*, 9 Cir., 1960, 283 F. 2d 659; *Bruce* v. *Lumbermen's Casualty Co.*, 4 Cir., 1955, 222 F. 2d 642.

In addition to what has been already mentioned the policies read that the Insurer

> "[a]grees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and *subject to* the limits of liability, *exclusions*, conditions and other terms of this policy." (Emphasis supplied.)

The aircraft policy had these additional words "to afford those of the following coverages as specified in the declarations." By this clause the two policies explicitly state the intention of the parties to agree that the insurance afforded was "subject to * * * exclusions." The judgment

was based upon injuries received under circumstances not included within the coverage of the policies. There is no ambiguity which authorizes this court to increase the coverage. *Cf. Employer's Liability Assur. Corp.* v. *Maryland Cas. Co.*, 7 Cir., 1956, 230 F. 2d 370.

We have adopted almost in its entirety the excellent opinion written by District Judge Casper Platt and affirm the order of the District Court discharging the Garnishee and dismissing the garnishment proceedings.

JUDGMENT AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Wednesday, February 28, 1962.

Before

Hon. Elmer J. Schnackenberg, *Circuit Judge*.
Hon. Win G. Knoch, *Circuit Judge*.
Hon. Latham Castle, *Circuit Judge*.

JEWELL GABBARD LITTRALL and LOUIS DYSON,
Plaintiffs-Appellants.

No. 13510

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the District of Eastern Illinois.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court discharging the Garnishee and dismissing the garnishment proceedings in this cause appealed from be, and the same is hereby, AFFIRMED with costs, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Friday, March 30, 1962.

Before

Hon. Elmer J. Schnackenberg, *Circuit Judge*.
Hon. Win G. Knoch, *Circuit Judge*.
Hon. Latham Castle, *Circuit Judge*.

JEWELL GABBARD LITTRALL, ETC., ET AL.,
Plaintiffs-Appellants,

No. 13510

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
Garnishee-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and it is hereby, DENIED.

Statutes Involved.

Illinois Revised Statutes, Ch. 15½, § 22.42a:

"The owner of every aircraft which is in any manner involved in an accident within this State, in which any person is killed or injured or in which damage to the property of any one person, other than to his own property, in excess of $100 is sustained, shall within 10 days after such accident, report the matter in writing to the Department. Such report, the form of which shall be prescribed by the Department, shall contain information to enable the Department to determine whether the requirements for the deposit of security under Section 42-b are inapplicable by reason of the existence of insurance or other exceptions specified in Sections 42-b and 42-c. The owner shall furnish such additional relevant information as the Department shall require."

Illinois Revised Statutes, Ch. 15½, § 22.42b:

"(a) If 20 days after the receipt of an accident report as specified in Section 42-a the Department does not have on file evidence satisfactory to it that the person who would otherwise be required to file security under subsection (b) of this section has been released from liability, or has been finally adjudicated not to be liable or has executed a duly acknowledged written agreement providing for payment of an agreed amount in installments with respect to all claims for injuries or damages resulting from the accident, the Department shall determine the amount of security which shall be sufficient in its judgment to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against each owner.

"(b) The Department shall, within 60 days after the receipt of such accident report, suspend the certificates of registration of each owner of an aircraft in any manner involved in such accident, and if such owner is a nonresident the privilege of the use within the state of any aircraft owned by him, unless such

owner shall deposit security in the sum so determined by the Department; provided notice of such suspension shall be sent by the Department to such owner not less than 10 days prior to the effective date of such suspension and shall state the amount required as security. Where erroneous information is given the Department with respect to the matter set forth in subsection (c) of this section, it shall take appropriate action as hereinbefore provided, within 60 days after receipt by it of correct information with respect to said matters."

Illinois Supreme Court Rule 13(3):

"In pleading the performance of a condition precedent in a contract, it is sufficient to allege generally that the party performed all the conditions on his part; if the allegation be denied, the facts must be alleged in connection with the denial showing wherein there was a failure to perform."

22 Illinois Law and Practice, "Insurance", § 149, pp. 195-8:

"The fundamental law of construction of insurance contracts is that all uncertainty shall be resolved in favor of the insured.

"The general rule, subject to qualifications discussed infra § 150, is that an insurance policy should be construed liberally and most strongly in favor of the insured, to the end that he will not be deprived of the benefit of insurance. The rule of construction to be adopted should be a liberal one favoring the insured, so as not to defeat, without a plain necessity therefor, his claim to indemnity, and if an insurance policy can be given any reasonable construction preventing defeat of insured's indemnification for loss covered by its general language such construction will be adopted.

"In other words, where ambiguity exists in an insurance contract, the courts will adopt a liberal construction of the language used in favor of the insured, and the policy will be construed strictly and strongly against the insurer. The reason underlying this rule

is not the loss of the insured or the disparity between the resources of insured and insurer, but the fact that the words used were chosen by the insurer and that the ambiguity is chargeable to it.

"Since the contract of insurance is written by the insurer, and its provisions are inserted for its benefit, the rule that words of an instrument shall be taken more strongly against the party employing them is applied against insurers."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 949

JEWELL GABBARD LITTERAL AND LOUIS DYSON,
Petitioners,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION,
Respondent.

BRIEF FOR RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 949.

JEWELL GABBARD LITTERAL AND LOUIS DYSON,
Petitioners,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION.
Respondent.

BRIEF FOR RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

COUNTERSTATEMENT.

Respondent considers the Petitioner's "Statement of the Case" insufficient to fully present to the Court the matters here in issue and, therefore, offers the following counterstatement.

On September 5, 1955, one Robert Schindler borrowed a Globe Swift aircraft from Louis Dyson, d b a Illini Airport, in Urbana, Illinois. (App. 2-3.) Shortly after take off, with the Petitioner, Jewell Litteral, riding with him, the aircraft crashed. Jewell Litteral having suffered injuries in the aircraft accident, recovered a judgment against Louis Dyson d b a Illini Airport. (App. 45.)

The Petitioner, Aywell Gabbard Litteral, thereafter instituted the present garnishment suit against Respondent, Indemnity Insurance Company of North America, including as a party the name of Louis Dyson, from whom she had previously secured such judgment.

Louis Dyson was the operator of the Illini Airport at Urbana, Illinois. In this garnishment suit, he is a nominal party and did not appear or participate therein.

On August 26, 1955, Dyson secured from the Respondent an "Aircraft Liability Policy." On April 3, 1955, Dyson had secured from Respondent a policy of insurance designated "Airport Liability Policy." On September 5, 1955, the date of the accident in which Petitioner was injured, both of these policies were in full force and effect. (App. 2-3)

The Respondent, in answer to the garnishment Summons and Interrogatories, denied any indebtedness to Dyson or possession of any assets or claims due him. (App. 9)

The District Court, after a hearing on the merits, filed a memorandum opinion containing its findings of fact and conclusions of law, and thereupon entered a judgment discharging the Respondent as garnishee and dismissing the garnishment proceedings. (App. 9-19).

The findings of fact in the original action against Dyson contained the following paragraph:

> "that on the 5th day of September, 1955, the defendant, Louis Dyson, doing business as Illini Airport, was the owner of and possessed a certain airplane known as a Globe Swift Model GC 1B Airplane, Identification Number 80621, which said plane was located at a certain airport known as Illini Airport. " " " (App. 8-10).

Further findings of fact established that Dyson had entered into negotiations on September 5, 1955 to sell the Globe Swift aircraft to one Robert Schindler, who re-

quested permission to use the aircraft to take a trip to another state several hundred miles away. (App. 6)

Dyson had assured Schindler that the Globe aircraft was in a good mechanical condition. There were certain wires and hazards located near the Illini Airport which Dyson knew or should have known that the Globe aircraft, with its type of propeller, would have difficulty in flying over, but that he directed Schindler to take off as a result of which, shortly after and near the Illini Airport, the aircraft crashed to the ground and the Petitioner, who was in the airplane with Schindler, was injured. The findings of fact in the memorandum opinion of the 18th Circuit Court further disclosed:

> "that said defendant (Dyson), either by himself or by his agents and servants negligently and carelessly did one or more of the following acts or omitted to do said acts, namely:
>
> "a. Negligently and carelessly directed the pilot of said airplane to take said airplane off the ground and into the air when a cross wind was blowing along the flight strip.
>
> "b. Negligently and carelessly directed the pilot of said airplane to pilot said airplane into the air when it was too close to the outside edge of the flight strip, and so as to create a hazard.
>
> "c. Negligently and carelessly furnished an airplane with a defective propeller or a propeller which was of a design not suited or proper for installation in said airplane.
>
> "d. Negligently and carelessly operated said airport and operated said airport in violation of the provisions of the Statutes of Illinois and the Civil Aeronautics Regulations, and failed to make an inspection of said airplane as required, and did negligently and carelessly operate said airport with a hazard as is alleged herein, located thereby." (App. 10.)

THE AIRCRAFT LIABILITY POLICY (NO. 38622).

The aircraft policy recited in Item 4:

"The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto." (App. 11.)

Under Item 5 of the aircraft policy, the description of the aircraft is:

"All NC Licensed Aircraft Owned, Operated, Leased or Borrowed by the Named Insured."

Attached to this aircraft policy are various endorsements, the pertinent provisions thereof being as follows:

"Endorsement No. 1.

"Automatic Attachment and Termination of Coverage:

The coverages as indicated in the schedule of Coverages of this policy shall apply to all aircraft having an 'NC' certificate issued by the United States Civil Aeronautics Administration owned by the insured at the inception date of this policy and shall automatically apply to any similarly certificated aircraft acquired by the insured as owner during the policy period. This insurance shall terminate with respect to any aircraft disposed of on the date of sale of such aircraft or the surrender of the legal possession thereof by the insured or upon expiration of this policy, whichever may first occur.

"Deposit Premium and Rates:

* * *

The rates for this policy are:

Coverages	Rates
D & F	$.14 per day, each aircraft owned and operated.

Coverage E not provided except as respects the planes described in Endorsement No. 2." (App. 11-12.)

"Endorsement No. 2

In consideration of premium to be determined by audit it is agreed that with respect to the following aircraft only:

1. Coverage E, Passenger Bodily Injury Liability is amended to read:
   $20,000.00 each person
   $60,000.00 each occurrence
2. The rate for the above extension shall be $.40 per day owned or operated and shall be applicable only to:
   Navion
   Piper Tri-Pacer
   Piper Tri-Pacer
   Piper PA 22

Endorsements 3, 4, 5, 6 and 7 add and delete other planes, but the Globe Swift aircraft involved in the accident was not listed or mentioned on any endorsement. (App. 42.)

The aircraft policy contained three items of coverage under the heading "Insuring Agreements", substantially as follows:

"Coverage D—Bodily Injury Liability excluding Passengers to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish, including death at any time resulting therefrom, sustained by any person or persons other than passengers as defined herein, arising out of the ownership, maintenance or use of the aircraft as described in this policy."

"Coverage E—Passenger Bodily Injury Liability to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish, including death at any time resulting therefrom, sus-

tained by any passenger or passengers as defined herein, arising out of the ownership, maintenance or use of the aircraft as described in this policy."

"Coverage F—Property Damage Liability." (App. 12-13.)

THE AIRPORT LIABILITY POLICY (NO. 9941).

The airport liability policy contained two pertinent provisions, as follows:

"Insuring Agreements"

"Coverage A—Bodily Injury Liability to pay on behalf of the insured, provided premium is charged under Coverage A in the declarations, all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish including death at any time resulting therefrom, sustained by any person or persons and arising out of the ownership, maintenance or use of the airport premises described in the declarations and all operations which are necessary or incidental to the ownership, maintenance or use of said premises as an airport."

* * *

"Exclusions"

"This policy does not apply:

* * *

"(f) to bodily injury or death or injury to or destruction of property caused by or arising out of (1) the existence, maintenance or use of any aircraft owned by, hired by or for, or loaned to the insured or any aircraft in flight by or for the account of the insured." (App. 13-14 and 27-28.)

On September 10, 1955 (five days after the accident in which Petitioner was injured), the Respondent, through an authorized agent, signed an accident report form and filed

it with the Department of Aeronautics of the State of Illinois, as required by the provisions of the Illinois Statute. (App. 17.) In this report, it was stated by Respondent that with regard to the "aircraft policy" of Louis Dyson, such policy did afford bodily injury coverage, including passenger liability of not less than $5,000.00 for any one person, and that such policy did afford property damage coverage of not less than $5,000.00. (App. 29.)

SUMMARY OF ARGUMENT.

1. The aircraft liability policy did not insure the Globe Swift aircraft involved in the accident for injuries to Petitioner, who was a passenger therein.

2. The aircraft policy cannot be rewritten to provide passenger injury coverage on the Globe aircraft on the basis of any waiver or estoppel resulting from the filing by Respondent of an accident report form with the Department of Aeronautics of Illinois.

3. Neither can the aircraft policy be rewritten to provide coverage to Petitioner, a passenger, on the theory that the accident report of Respondent constituted a practical construction of an ambiguous contract by both parties thereto.

4. The Petitioner's injuries arose out of the crash of an aircraft owned by Dyson, the insured. The airport policy has excluded any coverage for injuries arising out of the existence, use or flight of an aircraft owned by the insured.

PROPOSITIONS OF LAW RELIED UPON.

The primary purpose in construing an insurance policy contract is to give effect to the intention of the parties, as expressed in the contract.

Leatin v. *Continental Insurance Company*, 412 Ill. 158, 162, 163 (105 N. E. 2d 735, 735).

Merchants Transportation Company v. *Dubuque Fire and Marine Insurance Company*, 200 Fed. 2d 348, 351.

Where the language of the contract is clear, the terms are to be taken and understood according to their plain ordinary and popular sense. The intention of the parties must be ascertained from the words used, where such words are of aid in determining such intention.

Moscov v. *Mutual Life Insurance Company*, 387 Ill. 378, 383-385 (56 N. E. 2d 399, 402-403).

The contract of insurance must be construed according to the sense and meaning of the terms the parties have used.

Sistler v. *Illinois Bankers Life Company*, 341 Ill. App. 512, 520 (95 N. E. 2d 507, 511).

Insurance contracts commonly define the hazards and the extent of coverage. A court cannot reject some express statements of coverage and declare that another coverage was intended to apply in all cases. The court cannot under the guise of construction make a new contract for the parties. No perversion of language can be permited in order to create an ambiguity where none exists.

Yadro v. *United States Fidelity & Guaranty Company*, 4 Ill. App. 2d 477, 481-482 (124 N. E. 2d 370, 372).

In construing a contract of insurance, all riders and endorsements constitute, with the policy, one entire contract. If there be any conflict between policy and endorsement, the terms of the endorsement will control.

Quinlan & Tyson v. National Casualty Company, 311 Ill. App. 369, 378 (36 N. E. 2d 470, 474-476).

Konrad v. Hartford Accident Company, 11 Ill. App. 2d 503, 526 (137 N. E. 2d 855, 866-867).

Morris & Company v. Rhode Island Insurance Company, 181 Ill. App. 500, 504 (17 N. E. 2d 619, 621).

An insurance contract must be construed as any other contract.

Harrell v. Bankers Mutual Life Insurance Company, 302 Ill. App. 374, 379-380 (23 N. E. 2d 818, 821).

In the absence of a clear and apparent ambiguity, neither party is favored in construction of an insurance policy.

Colonial Coach Manufacturing Company v. Home Insurance Company, 260 Fed. 2d 532, 534.

Carter v. Nehi Beverage Company, 329 Ill. App. 329, 332 (68 N. E. 2d 622, 623).

The doctrine of waiver and estoppel, while applicable to grounds of forfeiture, cannot be invoked in reference to conditions going to coverage, whereby a new coverage and liability would be created, not included or contemplated by the policy.

Peters v. Great American Insurance Company, 177 Fed. 2d 773, 778.

16 *Appleman Insurance Law & Practice*, Sec. 9083, 9090 (1st Ed.) (1941).

Ash Grove Lime & Cement Co. v. Southern Surety Company, 225 M. A. 712 (39 S. W. 2d 434, 439).

Conner v. *Union Insurance Company*, 122 C. A. 105 (9 Pac. 2d 863, 865).

State Farm Mutual Insurance Company v. *Petsch*, 261 Fed. 2d 331, 335.

Fidelity & Guaranty Fire Corporation v. *Belquist*, 99 Fed. 2d 333, 335; 113 A. L. R. 857-871.

Nor is there a difference in Illinois between waiver and estoppel in interpretation of insurance contracts.

Stahly Cartage Company v. *Universal Mutual Casualty Company*, 11 Ill. App. 2d 368 (138 N. E. 2d 243, 244).

A provision prohibiting a change in policy coverages except by endorsement signed by an officer of the company, is a valid and binding requirement.

Providence Washington Indemnity Company v. *Varella*, 112 Fed. Supp. 732, 734.

Peters v. *Great American Insurance Company*, 177 Fed. 2d 773, 778.

Where there is no conflict between the words used in the exclusion clause and both the general and specific provisions may be given a reasonable effect, both are to be retained.

Bruce v. *Lumbermens Casualty Company*, 222 Fed. 2d 642, 644, 645.

The exclusion term "arising out of" sufficiently and clearly supports the enforcement of the exclusion where an accident does arise out of the use excluded.

Bruce v. *Lumbermens Casualty Company*, 222 Fed. 2d 642, 644, 645.

Underwriters at Lloyds v. *Cordova Air Line*, 283 Fed. 2d 659, 665.

Schmidt v. *Utilities Insurance Company*, 353 Mo. 213 (182 S. W. 2d 181, 183-185).

ARGUMENT

The Petitioner, Jewell Gabbard Litteral, instituted the present garnishment suit, including as a party the name of Louis Dyson, from whom she had previously secured a judgment.

Louis Dyson was the operator of the Illini Airport at Urbana, Illinois. In this garnishment suit, he is a nominal party. He did not appear or participate in the case.

THE AIRCRAFT POLICY (NO. 38622).

On August 26, 1955, Dyson secured from the Respondent insurance company an "Aircraft Liability Policy."

This policy provided that Coverage E (passenger injury liability) *was not included* except as respects the particular aircraft described by endorsement. (App. 24.)

The Globe Swift aircraft in which the passenger, Jewell Gabbard Litteral, was riding when it crashed was not named among the aircraft from which Dyson desired and secured Coverage E protection. After issuance of the original policy, Dyson sought and received passenger injury coverage (Coverage E) on other aircraft by the various endorsements 2 through 8. (App. 25-26.) Just as the Globe Swift aircraft was not included as to Coverage E in the original policy, neither was it added by the subsequent endorsements.

Although Petitioner has referred in her Petition to the Globe aircraft as an "after acquired aircraft," the record is barren of any evidence that Dyson acquired this aircraft after the policy was issued (August 26, 1955) and prior to the accident (September 5, 1955).

So far as the record discloses, Dyson actually owned the Globe aircraft before he received the original policy.

Dyson neither paid, nor was he ever charged, a premium for passenger liability coverage (Coverage E) on the Globe aircraft.

The policy did provide other coverages, viz.: Bodily injury except to passengers (Coverage D) and property damage (Coverage F). Such coverages were afforded all aircraft owned or later acquired by Dyson. (App. 21.)

The policy did not, substantially, limit Dyson's use of aircraft for which Coverages "D" and "F" were afforded, since it recited several uses, including pleasure and business, Industrial Aid, Limited Commercial and Commercial.

The only apparent limitation as to the type of aircraft to be included under Coverages "D" and "F" is that contained in Item 5 (App. 21), referring to "all N.C. licensed aircraft owned, operated, leased or borrowed, by the named-insured."

There are other pertinent policy provisions.

In Item 4 (App. 21), it was specifically set forth that the insurance afforded Dyson was to be only with respect to the coverages for which a specific premium was indicated, and each was subject to all exclusions and conditions set forth in the policy.

In the automatic attachment provision of the policy (App. 24) covering newly acquired aircraft, Dyson was to receive such coverages as were contained in the original policy schedule of coverages, *and nothing more*. Thus, Coverages "D" and "F" would automatically apply to newly acquired aircraft, but Coverage "E" (passenger injury liability) would not apply unless specifically added by endorsement.

We perceive no ambiguity in this policy of insurance.

Its terms and provisions convey a clear, plain and common sense meaning.

Petitioner was a passenger in the Globe aircraft. The pilot, Robert Schindler, with a view to a possible purchase, had borrowed it to take a trip to another state several hundred miles away. (App. 3.) No other persons were aboard. Shortly after take-off, and near the Illini Airport, it crashed to the ground and Petitioner was injured.

The policy did not provide passenger liability coverage on the Globe aircraft. The policy defined in simple language a passenger *wherever the word "passenger" was used*, as a person "while in the aircraft for the purpose of * * * flight, or attempted flight, therein." (App. 23.)

Petitioner was not a pilot, or a student pilot, or a paying occupant. She was simply in the aircraft for the purpose of flight. Petitioner was a passenger pure and simple as defined in the policy.

Basic principles of law must be given application in considering the issues raised in this case.

The primary purpose in construing an insurance contract is to give effect to the intention of the parties as expressed in the contract. Where the language is clear, the terms used are to be understood according to their plain ordinary sense. *Lentin* v. *Continental Insurance Company*, 412 Ill. 158, 105 N. E. 2d 735, 737; *Merchants Transportation Company* v. *Dubuque Fire & Marine Insurance Company*, 200 Fed. 2d 348; *Moscov* v. *Mutual Life Insurance Company*, 387 Ill. 378, 383-385, 56 N. E. 2d 399, 402-403.

The insurance policy must be construed according to the sense and meaning of the terms used by the parties. *Sistler* v. *Illinois Bankers Life Company*, 341 Ill. App. 512, 520, 95 N. E. 2d 507, 511.

It is not uncommon for insurance policies to define haz-

ards and specify the extent and limit of coverage as to different risks. A court is without authority to reject some express statements of coverage and declare some other coverage was intended to apply in all cases. This would violate the principle that a court cannot under the guise of construction make a new contract for the parties.

The rule of construction favoring the insured, only in case of ambiguity, does not authorize a perversion of language to create an ambiguity when none exists. *Yadro* v. *United States Fidelity & Guaranty Company*, 4 Ill. App. 2d 477, 481-482, 124 N. E. 2d 370, 372.

In construing the insurance contract, all accompanying riders and endorsements constitute, with the policy, the entire contract and must be considered together and in its entirety. In the event of any conflict between policy and endorsement, the terms of the endorsement will control. *Quinlan & Tyson* v. *National Casualty Company*, 311 Ill. App. 369, 36 N. E. 2d 470, 474-476; *Konrad* v. *Hartford Accident Company*, 11 Ill. App. 2d 503, 526, 137 N. E. 2d 855, 866-867; *Morris & Company* v. *Rhode Island Insurance Company*, 181 Ill. App. 500, 504, 17 N. E. 2d 619, 621.

A court must construe and interpret an insurance contract the same as any other contract. *Harrell* v. *Bankers Mutual Life Insurance Company*, 302 Ill. App. 374, 379-380, 23 N. E. 2d 818, 821.

The Court is not here concerned with whether the Globe aircraft was, under the after acquired aircraft clause, covered by Schedule "D" or "F" of the policy. The precise question here is whether the policy and its endorsements provided Coverage "E", passenger liability protection on the Globe aircraft, to the benefit of the Petitioner, a passenger injured while riding in the aircraft.

Such protection was expressly excepted by the very terms of the policy and endorsements thereto. No charge for such coverage was ever made, or paid.

Nothing, it is submitted, can be more crystal clear. Any other construction would destroy and render absurd the manifest purpose and expressed intent of the contract as made between the parties.

The coverage afforded newly acquired aircraft, as the policy states, was to be that provided by the original policy — certainly not passenger liability coverage.

Thus, although there is no proof that the Globe aircraft was an after acquired aircraft, this is of no significance. In either event, the policy did not automatically provide Coverage "E" protection.

Petitioner, in effect, has asserted that while the policy in truth provided no passenger liability coverage as to this aircraft owned by Dyson, on the date of its issuance, such liability can here be predicated upon the acquisition by Dyson of a new aircraft for which he should be given new and additional coverage, under the automatic coverage clause.

This argument is refuted by the contract. To so construe the policy and its endorsements would be a perversion of the language therein recited. It would create a new contract.

However, if such were a possible construction, then Petitioner should have established by proof that the Globe was a newly acquired aircraft — one acquired after August 26, 1955 when the original policy and endorsements 1 and 2 were issued.

Again, Petitioner asserts that Coverage "E" was to exclude only passengers for hire and all other passengers were covered with passenger liability protection on all aircraft owned by Dyson. The contract provided otherwise. It defined the word "passenger" whereby no question could later arise as to what the parties intended by the use of the word.

Similarity is seen by Petitioner in the definition of the word "passenger" in the instant case and the provision contained in the policy under consideration in *Ohio Casualty Company* v. *Gantt*, 256 Ala. 262; 54 So. 2d 595, 601. (Petition, p. 16.)

In the *Gantt* case, a student pilot was injured when landing an aircraft owned by the operator of a flying school. The policy insured all persons except passengers. It defined the word "passenger" as any person riding in the aircraft except a person operating the aircraft.

It is difficult to understand how a passenger can be something different than a guest or an occupant. Nevertheless, the Dyson policy afforded Coverage "E" protection only to those aircraft specifically enumerated by endorsement, and not to all aircraft owned by, or acquired by, Dyson. The *Gantt* case is not applicable.

Petitioner's recitation of the many risks an airport operator may encounter in a work-a-day world, does not authorize a Court's successive writing of a new contract providing coverage to fit each new situation that might arise, and for which Dyson might very well wish later that he had previously secured and paid for.

There is no evidence in this case, except the contract itself, by which Dyson's mind can be revealed. We cannot say that Dyson desired, or intended, coverage for every conceivable risk that might arise. Such was not his contract. No proof was offered as to what he desired or intended to secure by the policies. Such overall protection he neither ordered nor paid for.

Petitioner seeks to interpret the word "passenger" to suit her own present ambition. By recalling mirthful but non-judicial utterances of Amos and Andy, and Humpty-Dumpty (Petition, pp. 16-17), Petitioner ignores settled principles of law, and Petitioner expresses concern over

pilots, student pilots and renters, but the pilot, Schindler, is not the Petitioner here. The Petitioner here was, pure and simple, a passenger. Actually there is no proof as to whether she paid Schindler for her ride in the Globe aircraft or was riding gratis.

Coverages "D" and "E" obviously applied to the various "uses" enumerated in Item 6 of the policy. As to those aircraft specifically listed by endorsement, and for which a special premium of 40 cents per day was charged, Coverage "E" was also applicable. Thus, plaintiff's fear that "defendant seeks to nullify all protection promised by Coverage D * * *" (Petition, p. 17) has been allayed.

Under Coverage "D", if a person, not a passenger as defined by the policy, was injured when one of Dyson's planes collided with him on the ground, exploded and burned him while walking nearby, struck a hangar or tower while he was at work, or in too many instances to enumerate, such person would be fully covered.

However, if a passenger as defined in the policy was injured, only to the extent Coverage "E" applied would such a person be afforded protection. These are the clear and simple provisions of the contract of insurance.

In *Wold v. Glen Falls Indemnity Company*, 269 Ill. App. 407, cited by Petitioner (Petition, p. 18), the policy insured the use of any vehicles in the business of the owner, or otherwise. Then, in Paragraph 4, it recited that the insured's occupation was contract hauling for Protection Products Company only.

The accident occurred while the insured was hauling packages to Protection Products Company, but was also carrying on the truck packages to be delivered ultimately to another company.

The Court there held these two policy provisions to be somewhat contradictory. The second tended to limit, or

restrict, the first. The construction appearing more reasonable and more favorable to the insured was adopted.

In the instant case, no conflict appears. The policy clearly and without ambiguity provided that passenger liability was not included except by specific endorsement. The *Wold* case is not in point.

Petitioner cites *Scott* v. *Freeport Casualty Company*, 392 Ill. 332 (Petition, p. 18), where the person who was insured in the farm business did, on one isolated occasion, use his vehicle as a salesman. Such an isolated use was held not to vitiate the policy, stating the use to be as a farmer. Occasional incidental acts did not constitute a change of the usual occupation of farmer to that of salesman.

Since Dyson never had passenger injury coverage on the Globe aircraft, no question arises concerning any change in occupation or business whereby some coverage actually provided is sought to be held voided. The *Scott* case is not in point.

In supporting the decision rendered by the Trial Court and the Court of Appeals, Respondent here relies simply and completely on the contract made, and the basic principles of law applicable.

In the absence of a clear and apparent ambiguity, neither party can be favored in the construction of the contract of insurance. The terms used may not be distorted from their natural meaning, and the agreed liability of the insurer enlarged. *Colonial Coach Manufacturing Company* v. *Home Insurance Company*, 260 Fed. 2d 532; *Carter* v. *Nehi Beverage Company*, 329 Ill. App. 329, 332; 68 N. E. 2d 622, 623.

Within the rule of reason and common sense, *when a clear ambiguity does exist*, that construction which is more favorable to the insured will be adopted. This rule does not authorize a perversion of the language used in order to

create an ambiguity where none exists. *Fadro v. United States Fidelity & Guaranty Company*, 4 Ill. App. 2d 477, 481-482; 124 N. E. 2d 370, 372.

Contrary to Petitioner's assertion (Petition, p. 10), Dyson did not want passenger liability coverage on all of his aircraft—certainly not on the Globe aircraft. (He probably could not afford it.) If Dyson had wanted this protection at the additional 40 cents per day charge, he would have secured it by endorsement—just as he did on certain other aircraft by endorsements 2, 3, 4 and 5. (App. 25-26.)

Petitioner contends that Respondent is estopped to deny that Coverage "E", passenger liability coverage, existed, because it notified the Department of Aeronautics on September 10, 1955 that under the policy such liability coverage existed.

Petitioner raised this issue of waiver or estoppel in the Trial Court. In the Court of Appeals, Petitioner, for the first time, declared that it is not strictly a matter of waiver or estoppel, but simply a matter of interpreting an ambiguous, doubtful and uncertain contract, in the manner the parties themselves by their own acts intended it to read.

Any construction whereby passenger liability coverage on the Globe aircraft can be created, would do violence to the clear and explicit terms and provisions of the policy.

Certainly any contended understanding of the contract on the part of Respondent, based on its accident report form, was not also the understanding of Dyson. In this there is no mutuality of understanding, obligating Dyson to pay an additional $146.00 of premium (40 cents per day for 365 days). There is no proof Dyson so understood his contract. The evidence is to the contrary. The policy refutes any such contention.

Dyson did not believe that he had secured Coverage "E"

protection on the Globe aircraft, nor as Petitioner boldly states, without proof, Dyson did not believe he had secured and paid for such protection on every aircraft he owned.

It must be noted that while Petitioner states (Petition, p. 11, bottom), "Louis Dyson filed his report (Plaintiff's Exhibit 8A) describing the accident and showing that such coverage was carried * * *", nowhere in the Appendix can such an Exhibit 8A be found. There is, in the Appendix (App. 29), an exhibit, being a printed form directed to and executed by the Respondent, but not directed to or executed by Louis Dyson.

The Respondent filled in and signed the foregoing accident report form and filed it with the Department of Aeronautics of the State of Illinois. This was a unilateral act done by respondent outside the presence of, and without the knowledge of, Dyson.

Petitioner here, as in the Court of Appeals, asserts that the act of the Respondent in executing and filing the accident report form constituted an interpretation or construction of the insurance contract by both the insurer and the insured, whereby Respondent is now estopped to deny that the policy provided coverage for the benefit of Petitioner.

In each of the citations appearing in the Petition (pp. 10-14), the Court was confronted with the necessity of construing and interpreting doubtful, peculiar or ambiguous terms of a contract. None of these cases concerned insurance policy contracts. In each case, the parties, by their bilateral acts or conduct, had interpreted the contract or agreed to place a certain construction on the terms of the contract which was held to be helpful to the Court in performing its duty in determining what the actual intent of both parties had been when the contract was originally entered into.

In *City of Chicago* v. *Chicago City Railroad*, 245 Ill. App.

473 (Petition, p. 10), the defendant had deducted from its net income each year before determining the amount due the city for its franchise, its Federal income taxes under the contract provision permitting deduction of "all capital stock or franchise taxes." For a period of years the plaintiff, City of Chicago, had actual or constructive notice of this practice and made no objection. Because both parties had followed such an interpretation of the contract, the Court construed the provision involved as including Federal income taxes.

In *Stetson* v. *Chicago Aurora & Elgin Railroad*, 2 Ill. App. 2d 274 (Petition, p. 10), an employee claimed he was entitled to vacation benefits over and above his salary. For a period of years both the employer and employee had followed an arrangement or understanding whereby no vacation benefits were accorded the employee over and above his salary. Such interpretation of the agreement followed by both parties for a period of years was given effect by the Court as being highly persuasive in interpreting the contract.

In *Walters* v. *Walters*, 409 Ill. 298 (Petition, p. 10), the Court was called upon to interpret a settlement agreement entered into at the time of a divorce, which agreement the Court found to be ambiguous, but since in reliance on the husband's promises the wife had thereafter executed various deeds and assignments in order to give effect to the agreement, such acts of performance had so clearly indicated what both the husband and wife believed to be their true contract, that the Court did so interpret the settlement agreement.

In *Weger* v. *Robinson Company*, 340 Ill. 81 (Petition, p. 10), the Court was called upon to interpret a guaranty contract and observed that where both parties have construed their contract in a certain manner, or one has interpreted the contract in a certain manner to the knowledge

of the other party to the contract, the Court will adopt such interpretation, provided that such interpretation can be adopted without the making of a new contract for the parties.

In *Collins Company* v. *Silver*, 150 Ill. App. 430 (Petition, p. 11), the Court observed that the parties acting together had placed a certain construction upon their contract and having done so the Court will adopt such a construction.

In *Alexander* v. *Barrett*, 46 Ill. 226 (Petition, p. 13), the defendant had insisted on one interpretation of the contract and the plaintiff on another, but thereafter the plaintiff agreed to accept defendant's interpretation and thereafter defendant refused to perform in compliance with his own interpretation. The Court observed that justice required that the defendant be held to his own understanding of the contract and awarded damages to the plaintiff for breach of the contract.

In *Schmohl* v. *Fiddick*, 34 Ill. App. 190 (Petition, p. 13), the Court held that where a contract is doubtful or peculiar and the parties to the contract have by their declarations and acts together placed a reasonable construction upon the contract, such construction will be adopted by the Court in a suit requiring interpretation of the terms thereof.

In *People* v. *Adams*, 65 Ill. App. 283 (Petition, p. 14), the County Board of Supervisors had fixed the salary of the County Clerk. A dispute later arose as to whether under the order fixing the salary, the County Clerk could properly make claim for extra expenses of his office, including clerk hire, fuel and stationery. It appeared from the evidence that for a period of four years the County Board had, with knowledge but without objection, paid such claims for extra clerk hire, fuel and stationery, and not until four years after his term of office had expired had demanded from the County Clerk repayment of such items.

claiming that such were not included in a proper interpretation of the word "salary." The Court observed that the order fixing the salary was ambiguous in its terms, and that in construing the order, special credence would be placed by the Court upon the evidence showing that the County Board for many years had not questioned the right of the clerk to deduct such items of expense, and the Court declared that the interpretation which both parties had placed upon the order would be adhered to by the Court.

In the case at bar, the contract of insurance was clear and unambiguous. The interpretation or construction sought by Petitioner stems from the signing by Respondent alone of an accident report form.

Examination of this report form (App. 29) reveals that Respondent properly therein stated that "with regard to the aircraft liability insurance policy," such policy was in force and it did provide passenger liability coverage. It did not attempt to list the specific aircraft for which the policy would provide passenger injury liability coverage and any inference therefrom that the Globe Swift aircraft was so insured would have been misleading and unfortunate. Such a misleading inference, if it existed, could not create a new contract enlarging the coverage of the policy.

There was no passenger liability coverage on this Globe aircraft. The accident report form was not sufficient to change the clear and explicit terms of the policy and provide new and additional coverage not theretofore existing.

Any coverage to be predicated upon the accident report form must result from application of the principle of waiver or estoppel.

The doctrine of waiver or estoppel does not apply to matters of coverage so as to extend the scope of the contract beyond its express terms through the acts or conduct of an agent.

This doctrine cannot be invoked to create a primary liability and bring within the coverage risks not included, or contemplated, by its terms.

Conditions going to coverage, as distinguished from those going to a ground of forfeiture, may not be waived by the conduct or action of an agent.

The broadening of coverage of a policy so as to make it cover a risk not within its terms, is not a mere waiver of a condition in the policy, but the making of a new contract. *Peters* v. *Great American Insurance Company*, 177 Fed. 2d 773, 778; 16 *Appleman Insurance Law and Practice*, Sec. 9083, 9090; *Ash Grove Lime & Cement Company* v. *Southern Surety Company*, 225 M. A. 712, 39 S. W. 2d 434, 439; *Conner* v. *Union Insurance Company*, 122 C. A. 105, 9 Pac. 2d 863, 865; *State Farm Mutual Insurance Company* v. *Peisch*, 261 Fed. 2d 331, 335, 113 A. L. R. 857-871.

In interpreting insurance contracts in Illinois, there is no difference between the doctrines of waiver or estoppel. *Stahly Cartage Company* v. *Universal Mutual Insurance Company*, 11 Ill. App. 2d 365, 368, 138 N. E. 2d 243, 244.

In Illinois (Illinois Revised Statutes, Chapter 95½, Section 9-201), as in other states, there exists a statute commonly referred to as the "Guest Statute."

Under this statute, no person riding in a motor vehicle as a guest without payment shall have a cause of action for injuries caused by the host driver of the vehicle unless the accident was caused by the wilful and wanton misconduct of the host. In interpreting the word "guest" as used in this specific statute and as applied to suits brought by persons riding in a vehicle against the driver for wilful and wanton misconduct, the Illinois Supreme Court, *Connett* v. *Winget*, 374 Ill. 531 (Petition, p. 16), observed that the meaning of the word "passenger" is entirely different than the word "guest."

The *Connett* case dealt with the determination of whether or not a passenger was a guest under the guest statute, and has no application to this case. It involved an action against the driver of an automobile, while the instant case is an action against the owner of the airport and not the pilot of the airplane. Whether or not the Petitioner was a "guest" passenger or a "paying" passenger is of no consequence in this case. Moreover, the term "guest" is merely a descriptive term as to a certain type of passenger. This is illustrated by the following comment made by the Court in *Connett v. Winget*, 374 Ill. 531, 534, 30 N. E. 2d 1, 3:

> "It is clear the intention of *the passenger*, alone, does not determine *whether he becomes a guest*, since the invitation and the purpose of the ride may originate wholly with the owner of the automobile." (Emphasis added.)

More important, the definition of the term "passenger" in the policy answers all questions regarding this matter in that the Petitioner clearly comes within that definition.

THE "AIRPORT POLICY" (NO. 9941).

Petitioner does not seriously take issue with the decision of the District Court and the Court of Appeals, for she says (Petition, p. 18), "When we come to the airport policy there is more basis for the result reached by the Court of Appeals."

On April 3, 1955, Dyson secured from the defendant a policy of insurance designated as "Airport Liability Policy."

This policy provided coverage, subject to all exclusions, for injuries to persons arising out of the ownership, maintenance or use of the airport premises.

The policy contained an exclusion clause (f) (App. 28),

stating that the policy did not apply to injuries caused by, or arising out of, the existence, maintenance or use of any aircraft owned by Dyson, or any aircraft in flight for, or on account of, Dyson.

Petitioner secured her original judgment against Dyson on November 9, 1959. In that judgment Order are findings of fact that Petitioner's injuries were the direct and proximate result of one or more of a combination of acts of negligence on the part of Dyson, as follows:

1. Negligently directed the aircraft to take off in a cross-wind.
2. Negligently furnished a plane with a defective propeller.
3. Negligently operated his airport in violation of statute, and with a hazard located nearby.

Louis Dyson sought a policy of insurance to cover liability for his airport operations. He secured other insurance for liability in the use of aircraft.

The Insurance Company of North America was willing to issue to Dyson its Standard Airport Policy, whereby it insured him against liability for injuries occasioned to any person "arising out of the ownership, maintenance or use of the airport premises."

The company was willing to issue such a policy, however, only with the distinct, clear and explicit understanding that such policy would not apply to *injuries in any way caused by, or arising out of, the existence* of any aircraft owned by Dyson. Further, the policy would not apply to *injuries caused by, or arising out of, the use of* any aircraft owned by Dyson.

Further, the policy would not apply to *injuries caused by, or arising out of, any aircraft in flight* by, or for, the account of Dyson.

While the November 9, 1959 judgment found that Petitioner's injuries were occasioned by one or more of a combination of negligent acts, some of which referred to the operation of the airport and some to the condition of the aircraft, it is crystal clear that Petitioner was injured only when the aircraft struck a power line 500 or 800 feet away from the airport.

As appears manifest from the policy contract, the insurance company was not willing, nor was it paid a premium, to cover a risk in which the injuries suffered were (remotely or primarily) in any way connected with the *existence, maintenance or use* of an aircraft owned by Dyson, nor to any injuries in any way connected with an aircraft in flight on the account of Dyson.

The Exclusion Clause (f), being a standard provision of such contract, was inserted in the contract for a distinct purpose. Its meaning is clear, and simply this—that the policy would not cover injuries involved in the use of an aircraft owned by Dyson. Such was the occurrence in question, and such a peril or risk was not insured against by the contract.

Standing alone, without the exclusion clause, this policy conceivably could cover the injuries suffered by Petitioner.

This Court cannot reject Exclusion (f) in the policy, and declare that paragraph 1° of the Insuring Agreement was intended to apply in all cases, and ignore the limitations thereon appearing in Exclusion (f). *Yadro* v. *United States Fidelity & Guaranty Company*, 4 Ill. App. 2d 477, 481-482, 124 N. E. 2d 370, 372.

Petitioner contends the cause of the accident was negligent airport maintenance and operation which, under the Insuring Clause A (App. 27), renders the Respondent liable.

In this, Petitioner ignores the Exclusion Clause (f) (App. 28), which excepts injuries "arising out of" as well as those "caused by" the use of any aircraft owned by Dyson.

While, as the Trial Court observed, these words "arising out of" constitute a very broad phrase, yet it cannot be denied that the accident and injuries did arise out of the use of the aircraft. With such a clear and explicit exclusion, it would be improper to rewrite the policy by accepting Petitioner's desired contention. *Schmidt* v. *Utilities Insurance Company*, 353 Mo. 213, 182 S. W. 2d 181; *Underwriters at Lloyds* v. *Cordova Airlines*, 283 Fed. 2d 659, 665; *Bruce* v. *Lumbermens Casualty Company*, 222 Fed. 2d 642, 644-645.

The insuring agreement expressly by its terms was "subject to the limits of liability, exclusions, conditions and other terms of this policy."

The language of the policy being clear and explicit, the terms, provisions and exclusions therein contained must be taken and understood in their plain, ordinary and popular sense.

It is the intention of the parties as expressed by the words used in the contract, to which the Court must give effect. *Lenten* v. *Continental Insurance Company*, 412 Ill. 158, 162-163, 105 N. E. 2d 735, 737; *Merchants Transportation Company* v. *Dubuque Fire & Marine Insurance Company*, 200 Fed. 2d 348, 351; *Moscor* v. *Mutual Life Insurance Company*, 387 Ill. 378, 383-385, 56 N. E. 2d 399, 402-403.

In the *Moldovan* v. *United States Fidelity & Guaranty Company* case (184 N. Y. S. 2d 201), cited by Petitioner at page 20 of her Petition, the policy under consideration did not contain an exclusion clause such as in the present case, whereby the *Moldovan* case is not in point. Obviously

in our case, without the exclusionary clause as the Trial Court pointed out, a basis for coverage would exist.

Insofar as the airport policy is concerned, we deem the sole question for consideration to be, did the injuries suffered by the plaintiff in any way arise out of, or were they caused by, the existence, maintenance or use of Dyson's Globe aircraft, or were Petitioner's injuries caused by, or did they arise out of, any aircraft in flight for the account of the insured?

The terms used in the policy may not be distorted from their natural meaning, and the agreed liability of the insurer enlarged. *Colonial Coach Company* v. *Home Insurance Company*, 260 Fed. 2d 532, 534; *Carter* v. *Nebi Beverage*, 329 Ill. App. 329, 332, 68 N. E. 2d 622, 623.

Petitioner's injuries arose out of a violent crash of an aircraft in flight, owned by Dyson, clearly excluded by the policy terms.

CONCLUSION.

We respectfully submit that the Petition herein reveals no error in the decisions sought to be reviewed; that the case involves primarily the application of settled principles of law to the clear and plain language of an insurance policy in which two Courts below have unanimously agreed.

The judgment below does not conflict with decisions of this Court, or of other Courts of Appeal, or of the Courts of the State of Illinois.

There is no question involved of such a general or unusual nature as would here warrant the granting of certiorari.

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
MAY 31 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 949

JEWELL GABBARD LITTERAL AND LOUIS DYSON,
Petitioners,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION,
Respondent.

REPLY BRIEF OF PETITIONERS.

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For sake of clarity, all references to (App.) will be to the Appendix filed in the Court of Appeals, of which copies have been filed in this Court.

We quite agree with the decisions cited by the defense that if an insurance policy is unambiguous it will be construed as any other contract. And no authorities are cited by the defense upon any other point than this except that: 1. Waiver or estoppel cannot be used to create a new contract; 2. A policy provision against waiver prevents an effective estoppel, waiver, or modification by an agent. Let us dispose of these two points quickly and then return to the question of ambiguity.

If the defendant is sufficiently adroit to "hoist me by my own petard" by quoting from my set on insurance law,

then I do claim the privilege of being quoted accurately. As to point 2 above referred to, after pointing out that the parties at their pleasure may alter or modify any contractual provision or create rights by waiver or estoppel, the set goes on to discuss the effect of a "nonwaiver" clause, or attempt by the insurer by policy language to restrict contractual modifications to those made in writing endorsed on the policy by a company officer. And to quote exactly from 16 *Insurance Law & Practice*, § 9210, p. 761, it states:

> "A stipulation against oral waivers and requiring any waiver to be in writing and attached to the policy is, like any other policy provision, itself subject to waiver. Such stipulation is for the company's benefit, and may be waived by it. Such a waiver may be oral, or may be inferred from the acts or conduct of the insurer. The waiver of a nonwaiver provision may thus be implied by law from the conduct of an agent acting within the apparent scope of his authority."

In other words, not only is such a policy provision ineffective to accomplish the result claimed by the defense, but such provision may itself be waived orally or by conduct; and it is waived whenever an authorized representative acts inconsistently with the express policy terms but within the scope of his apparent authority. Many cases are cited in the footnotes to the above text, including Illinois authorities. So cited is *Phenix Insurance Company* v. *Grove*, 215 Ill. 299 at 302, 74 N. E. 141, the court stating:

> "The question whether there can be a waiver, not in writing, of a condition contained in a policy providing there shall be no waiver unless it is written upon or attached to the policy, arises on the demurrer to the second replication to each of the pleas. This question was decided in the affirmative in *Phoenix Ins. Co.* v. *Johnston*, 143 Ill. 106, *Phenix Ins. Co.* v. *Hart*, 149 id. 513, *Dwelling House Ins. Co.* v. *Dowdall*, 159

id. 179, *Phenix Ins. Co.* v. *Caldwell*, 187 id. 73, and *Orient Ins. Co.* v. *McKnight*, 197 id. 190. In those cases it was held that the stipulation in the policy that a waiver must be by an endorsement thereon was inserted for the benefit of the company, and, like any other condition of the policy for its benefit, might be waived by it. It is a just and reasonable rule that one who is authorized to waive a condition or provision of a policy by writing may also waive the writing. A provision that nothing less than an express agreement to be endorsed on the policy shall be effectual as a waiver is itself a condition, and is as capable of being waived and dispensed with as any other condition of the policy."

As to the claim that a contract cannot be created by waiver or estoppel, that was the error into which the defense misled the lower courts. We pointed out in our Petition in this Court that Illinois has for a century adhered to a doctrine which, under *Erie* v. *Tompkins*, the lower Federal Courts should have followed. That is, that where the parties have by their acts, statements, writings, or conduct placed an interpretation upon a contract, the courts will hold the parties to that interpretation. *E.g.*, *Walters* v. *Walters*, 409 Ill. 298 at 304, 99 N. E. 2d 342; *Weger* v. *Robinson Nash Motor Company*, 340 Ill. 81 at 91, 172 N. E. 7 at 11.

At no place has the defendant insurance company denied that Donald S. Bain was its "authorized representative" —the title borne by him in completing the accident report form (App. 29) for the purpose of certifying the existence of coverage. Indeed, the trial court expressly found that Bain was such an authorized representative (App. 17). The defendant company also states (Def's Brief, p. 23) that such report did not list the specific aircraft "for which the policy would provide passenger injury liability coverage." We regret that perhaps an excess of zeal led the

defendant into error here. The trial court expressly found (App. 17) as to this, as follows:

> "In this report it was stated that Dyson had a policy covering liability insurance for the injuries sustained by the crash of the Globe Swift aircraft. The insurance policy number listed in this report was the number of the aircraft policy."

When Donald S. Bain, as authorized representative of the defendant insurer, certified to the State of Illinois that defendant's policy covered the occurrence and protected the injuries to Mrs. Litferal, whether she be termed a guest, an occupant, or a passenger, that was the defendant insurer so certifying that fact as true. Its construction of the policy then is binding upon it now. In fact, defendant in its brief (p. 20) admits that: "The Respondent filled in and signed the foregoing accident report form and filed it with the Department of Aeronautics of the State of Illinois." Accordingly, it admits that the act of Bain was its act.

Indeed, let us go further. The defense states that it cannot be bound by estoppel. As we pointed out in our Petition, under Illinois law the defendant may be and is estopped from now asserting a position different than it asserted in its report to the State of Illinois. *Schmohl* v. *Fiddick*, 34 Ill. App. 150 at 198; *People* v. *Adams*, 65 Ill. App. 283 at 287. That doctrine of Illinois has not been challenged by the defense nor has any Illinois case been cited to the contrary.

And, under these circumstances, this makes particularly good sense. Let us return now to this "unambiguous" aircraft policy issued by the defendant insurer, and we will see why the only reasonable result is in favor of the plaintiff. To illustrate the utter confusion of the defend-

ant in its assertions, let us turn to page 12 of the defense brief. It is there stated:

> "The policy did provide other coverages, viz.: Bodily injury except to passengers (Coverage D) and property damage (Coverage F). Such coverages were afforded all aircraft owned or later acquired by Dyson. (App. 21.)
>
> "The policy did not, substantially, limit Dyson's use of aircraft for which Coverages 'D' and 'F' were afforded, since it recited several uses, including pleasure and business, Industrial Aid, Limited Commercial and Commercial.
>
> "The only apparent limitation as to the type of aircraft to be included under Coverages 'D' and 'F' is that contained in Item 5 (App. 21), referring to 'all N. C. licensed aircraft owned, operated, leased or borrowed, by the named-insured.' * * *
>
> "In the automatic attachment provision of the policy (App. 24) covering newly acquired aircraft, Dyson was to receive such coverages as were contained in the original policy schedule of coverages, *and nothing more*. Thus, Coverages 'D' and 'F' would automatically apply to newly acquired aircraft, but Coverage 'E' (passenger injury liability) would not apply unless specifically added by endorsement."

Now the insurer agrees that the various uses set forth in Coverage D are protected, including "pleasure and business, Industrial Aid, Limited Commercial and Commercial." Let us then turn to the cover sheet of that policy (App. 21) and see what those terms embrace.

We there find that these terms include protection for bodily injuries resulting from the "transportation of executives, employees, guests and customers." How, may we ask, may these persons be transported except inside the aircraft as occupants, by whatever name they may be called? Surely it is not contemplated that they will hang on to the wings or straddle the fuselage. And, further,

Coverage D embraces "instruction and rental to others" —in fact, all carriage "excluding any passenger carrying for which a charge is made." The term "instruction" contemplates the transportation of students who pay for this service; "rental" imports flight by persons who hire the aircraft for their own use and that of guests. In its definitions under Coverage D, the insurer excepts only "passenger carrying for which a charge is made"—in other words, the carrier situation where a greater duty is imposed by law upon the carrier.

Now, after the admissions upon page 12, which are in accord with our assertions, to the effect that the insured Dysoll was entitled to all this protection promised by Coverage D, the defendant insurer goes on to negate this on page 13 of its brief and following pages by using the term "passenger" as synonymous with "occupant".

We submit respectfully that such is no answer to the injured lady's contentions: If all occupants, although not paying for transportation nor occupying a preferential status with the insured charged with a legal duty as a carrier, are excluded from the policy protection—then what has happened to the protection the defendant admits on page 12 of its brief is owing under Coverage D? Has the protection promised for the transportation of executives, employees, guests, and customers suddenly become nugatory? Has the protection as to accidents occurring to students, renters, and their guests vanished?

Even the adroitness of the defendant insurer in drafting this nonstandard provision which it offered for sale to airport operators needing and wanting protection cannot make such an interpretation a reasonable one. The astute counsel who have long labored with this case cannot suggest any protection, under the defense theory, unless the craft crashed or exploded injuring a person on the ground

(Def's Brief, p. 17). The public has an interest in reasonable safeguards against airport hazards being insured, and clearly would and should expect more than this slim area of coverage as opposed to the vast uninsured areas which would be operative under the defense theory.

The defendant seeks to secure the result it desires by an adroit use of nomenclature. By repeatedly describing the plaintiff Jewell Litteral as a "passenger", defendant seeks to exclude her by invoking Coverage E (under which she does not claim). If she is a "passenger" merely because she rode in the aircraft with one who rented it, then is not every guest, every occupant, every student, every renter, indeed every pilot, a "passenger"? And, if this be true, then is not Coverage D, which they admit on page 12 of their brief protects against injuries to these very persons, superseded and made meaningless by Coverage E? We are chided for inappropriate humor, yet this is precisely the Amos and Andy type of coverage so often criticized by courts, lawyers, and laymen where the "big print gives it to you and the little print takes it away". This we deem to violate public policy. Illinois law demands that in such a situation a broad interpretation be given to the nature of the use insured. *Scott v. Freeport Motor Casualty Company*, 392 Ill. 332 at 345, 347, 64 N. E. 2d 542; *Wold v. Glens Falls Indemnity Company*, 269 Ill. App. 407 at 416.

As pointed out in our Petition (p. 16), Illinois law likewise demands that any possible interpretation be employed which will confer protection rather than to deny it. We are entitled to have this principle applied here. Coverage D, when applied for "commercial use" embraces every coverage except "passengers for hire"; and there has been no contention nor proof by the defendant that Jewell Litteral fell into that category.

The defendant makes an unfortunate statement upon

page 11 of its brief which could cause confusion. It there states:

> "Although Petitioner has referred in her Petition to the Globe aircraft as an 'after acquired aircraft,' the record is barren of any evidence that Dyson acquired this aircraft after the policy was issued (August 26, 1955) and prior to the accident (September 5, 1955)."

The inference would seem to be that perhaps this particular craft was not insured at all. Even had the defendant not so certified the fact of insurance to the State of Illinois, the policy itself covered (App. 11); "All N. C. Licensed Aircraft Owned, Operated, Leased or Borrowed by the Named Insured." And the trial court expressly found in its findings of fact (App. 9) that Dyson was on September 5, 1955, the owner of the above craft.

Therefore, we may lay aside the above assertion as being irrelevant to our consideration.

With reference to the airport policy, defendant states that plaintiff does not "seriously take issue with the decision" below. This is not accurate.

I was trained in the law in the belief that attorneys were officers of the court owing to it a duty of complete integrity. That obligation demands that where there are two divergent views both be fairly stated. The privileges of advocacy do not permit an unfair concealment of that situation.

In our brief, we pointed out that there are two views asserted by various jurisdictions where there is a public liability policy insuring against negligent acts but excepting or excluding a specific type of hazard. We went on, however, to point out that where the loss arises out of a type of negligence which is specifically insured, and there is also a type of conduct which is not insured, the majority

sof decisions still extend protection so long as the negligent insured act is in progress *provided such act helps to produce the injury.* We cited several illustrative decisions on this point in our Petition. The defendant cites not a single decision dealing with such a contract to aid this Court only a few cases mouthing general principles not of concern here.

Further, the defendant does not seek to distinguish *Boatwell* of any decision cited upon pages 18 to 20 of our Petition except *Moldovan.* And defendant's statement as to that decision, unfortunately, is not accurate. It infers that the policy in that case did not contain an excepted risk. Had defendant actually read that decision, it would have found that this involved a premises liability policy covering negligent acts arising out of the ownership, maintenance or use of described premises—precisely as Dyson's policy did here. There was a separate division of the policy (corresponding to the passenger coverage in Dyson's case) under which the insured could have purchased protection arising out of the acts of "Dogs and horses". This, however, the insured did not purchase. A dog owned by the insured escaped from the premises and bit the plaintiff on property adjacent to the insured premises. The court held that since there was a negligent act in failing properly to supervise the premises, permitting the injury to occur through escape of the dog, such act of negligence permitted recovery even though the instrumentality of injury was not insured. *Moldovan v. United States Fidelity & Guaranty Company,* 1959, 15 Misc. 2d 85, 184 N. Y. S. 2d 201 at 204, affirmed 8 A. D. 2d 607, 185 N. Y. S. 2d 735:

> "The criterion here is *not* the place where the ultimate act of injury was consummated, but is the place *where the act of negligence was initiated, originated or occurred.*" (Italics court's.)

The defendant's criticism of this decision, accordingly, is not well taken. Defendant does not attempt to distinguish the remaining authorities cited by us. Nor could it reasonably do so, because those cases support the view that where the negligence is continuing and helps to bring about the injury, a recovery may be had. But, again, to be completely fair, even though the defense apparently found no relevant authorities, there are decisions opposed to the view which we assert—although, in most of those cases, the active negligence insured against had ceased at the time and the injury resulted, in fact, from the inherent nature of the excluded risk.

In the instant case, it is not denied that the active negligence of the insured's employees in directing Schindler off an improper runway, with a cross-wind and high tension wires nearby, was an active, producing cause of the injury. We must also be critical of defendant for stating in its brief (p. 27) that the crash occurred some 500 or 800 feet from the airport. We have searched the Appendix containing the court's findings of fact and find no such statement, and it would seem that proper respect for this Court would not permit deviation from the record or findings of fact.

SUMMARY

We respectfully submit that under the undisputed facts the coverages here afforded by each policy covered the injuries to the plaintiff, Jewell Litteral, and requires the insurer to discharge the judgment rendered against its insured. If Illinois law is properly applied, we earnestly urge that no other view reasonably can be taken. And, in good conscience, this result is reasonable under the facts and under the prevailing law.

Wherefore, it is respectfully prayed that the petition for writ of certiorari be allowed.

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